

1 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 **JOHN C. FLETCHER,**

4 **Appellant,**

5 **v.**

6 **STATE OF WASHINGTON,**
7 **DEPARTMENT OF ECOLOGY,**

8 **Respondents.**
9 _____

)
)
) **PCHB NO. 94-178**

) **FINAL FINDINGS OF FACT**
) **CONCLUSIONS OF LAW**
) **AND ORDER**

10 This appeal was heard by the Pollution Control Hearings Board ("Board") on Friday,
11 December 16, 1994, in the Board's Hearing Room in Lacey, Washington. The Board was
12 comprised of Robert V. Jensen, presiding, and Richard C. Kelley and James A. Tupper, Jr.

13 John C. Fletcher, appellant, appeared pro se. The Department of Ecology ("Ecology")
14 was represented by Deborah Mull, Assistant Attorney General. The proceedings were recorded
15 by court reporter Betty J. Koharski, affiliated with Gene Barker and Associates, Inc. of Olympia.

16 The Board heard sworn testimony and reviewed exhibits. Based on its review of the
17 record, the Board makes the following

18 **FINDINGS OF FACT**

19 **I**

20 Mr. Fletcher moved into property along the South Fork of Harvey Creek about 50 years

21 **FINAL FINDINGS OF FACT**
22 **CONCLUSIONS OF LAW & ORDER**
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1 ago The water rights pertinent to Harvey Creek and its tributaries were adjudicated under the
2 state Water Code, in Stevens County Superior Court, by a decree issued on January 4, 1974
3

4 II

5 Under that decree, Mr Fletcher's right are for a total of 0.06 cubic feet per second ("cfs")
6 surface flow for stockwater, and 0.02 cfs combined domestic supply and stockwater, with a
7 priority date of 1890. In addition, he owns two adjudicated surface water rights from the South
8 Fork of Harvey Creek for irrigation. Each of these is for 1 cfs. The earliest right has a priority
9 date of 1891. It is for the irrigation of 100 acres, and is to be exercised from May 1 to October 1
10 annually. The water duty is 200 acre feet annually. The second right has a priority date of June
11 12, 1958. It allows 260 acre feet per year, for the irrigation of 133 acres. The diversion point for
12 these irrigation waters is approximately 2200 feet east and 100 feet north of the SW corner of
13 section 9, township 31 north, range 38 east of the Willamette Meridian
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17 III

18 Since that time, Mr Fletcher has obtained further surface water permits from the South
19 Fork of Harvey Creek, subject to the rights of senior appropriators, as follows
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- 21 1) 1 cfs, non-consumptive use for fish propagation, with a priority date of October 1,
22 1983, and
- 23 2) 0.04 cfs, 4 acre feet per year, continuously, for group domestic supply of 2
24 residential units, with a priority date of August 15, 1985. The point of diversion
25 is 1400 feet south and 1300 feet east of the NW corner of section 10

26 **FINAL FINDINGS OF FACT**
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1 IV

2 Both of these permits were issued by Ecology despite protests. The application for the
3 latter permit, which is the focus of this enforcement action and appeal, was the subject of a group
4 protest. The nature of the protest was a concern by downstream owners with adjudicated surface
5 water rights, that the stream was over appropriated.
6

7 V

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9 Ecology, in the Report of Examination for the 0.04 cfs domestic supply application, noted
10 that Mr. Fletcher had started the project. At that time, Mr. Fletcher had 2 existing domestic
11 units. He proposed to divert creek water to each for domestic purposes, by gravity flow through
12 a 5 inch diameter pipe, then into a smaller diameter pipe. The Report listed April 1, 1989 as the
13 completion date for the project.
14

15 VI

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17 On April 28, 1988, Ecology issued to Mr. Fletcher the 0.04 cfs domestic supply permit
18 (permit number S3-28063P) subject to various conditions. Among these was a requirement that,
19 at such time as Ecology should determine that regulation of the right would be necessary and in
20 the public interest, Mr. Fletcher would install and maintain an approved flow measuring device.
21 The permit was also subject to Mr. Fletcher obtaining an Hydraulic Project Approval from the
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1 state fish and wildlife agencies Finally, the permit for use of the public waters of the state was
2 issued subject to existing rights
3

4 VII

5 Ecology, shortly thereafter issued to Mr. Fletcher his first, of many, enforcement orders
6 On August 18, 1988, Ecology posted Mr Fletcher's property with a Notice of State Regulation,
7 stating that he was engaged in an "illegal diversion of state surface waters " He was ordered to
8 cease all diversions and work in the Harvey Creek drainage until further notice Ecology
9 officials posted its next notice on Mr Fletcher's property on August 18, 1988 Ecology stated in
10 that notice that Mr Fletcher had diverted state surface waters without the benefit of a permit He
11 was ordered to "[r]emove this diversion works and return the creek to its natural channel " The
12 next Ecology order was posted on Mr Fletcher's property on July 7, 1989 The notice informed
13 Mr Fletcher that his 0.04 cfs domestic surface water permit (equivalent to 18 gallons per minute
14 ("gpm")) was being exceeded The diversion works were capturing the entire stream flow
15 without any significant bypass Mr Fletcher was ordered to restrict the flow at the point of
16 diversion, to the authorized 18 gpm, until further notified Ecology posted a similar notice on
17 Mr Fletcher's property, one week later, on July 11, 1989 Finally, on August 11, 1992, Ecology
18 posted a notice on Mr Fletcher's property ordering him to cease all diversion other than that
19 permitted, or he would be assessed a penalty of \$100 per day The notice stated that he was then
20 diverting the entire flow of the creek, which then was approximately 200 gpm
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VIII

Ecology, in 1989, filed an enforcement action in Stevens County Superior Court against Mr Fletcher. The court, on August 14, 1989, ordered Mr Fletcher to restrict the use of the water under permit no S3-28063P, to 18 gpm, to serve only his mobile home and the new home occupied by the Chandler family, nearby. In addition, the court ordered Mr Fletcher to install, prior to August 7, 1989, a flow restriction device in the concrete diversion box, which would reduce the flow of water from the box into the 5 inch pipe, to ¾ inch. Finally, the court ordered Mr Fletcher to "take all reasonable and necessary steps to require those people living on his property and in houses located thereon to comply with the terms of this order." The court entered final judgment on March 30, 1990, limiting Mr Fletcher's use of the surface and ground waters of Harvey Creek, to those previously approved permits or rights described above.

IX

Mr Fletcher did not appeal the 1990 judgment. He did place a restriction device in the concrete box, in response to the 1989 court order, however, he removed it after a couple of weeks because he was dissatisfied with the results. He never consulted Ecology about this installation, nor did he inform Ecology when he removed it.

X

An Ecology employee received a telephone call from a senior water right holder on

1 Harvey Creek, in early July 1994. The caller complained that the creek was getting low and
2 might require regulation.

3 4 XI

5 Harvey Creek flows into the Columbia River at Cedonia, Washington. Upstream, the
6 creek breaks into north and south forks.

8 9 XII

10 On July 5, 1994, Ron Raby and Gene Drury of Ecology traveled up Harvey Creek to
11 measure its flow. They calibrated the flow on the main stem at 1.48 cfs. That amount was
12 insufficient to serve all the existing rights. They visited Mr. Fletcher's diversion for permit no
13 S3-28063P. The diversion consists of a fill across the creek. A culvert emits from the upstream
14 portion of the fill, to capture the entire flow of the creek. On top of and into the fill is built a
15 concrete diversion box. The culvert empties into this box. Mr. Fletcher has a 5 inch line
16 connected to the box, which leads to his residence. On the downstream side of the box are
17 boards, over which the water flows when the box is full. On July 5, only a small amount of
18 water was flowing downstream of the box, due to leakage from the boards.

21 22 XIII

23 On July 7, 1994, Ron Raby of Ecology received a phone call from a senior water right
24 holder, noting that the flow had dropped quite a bit. Mr. Raby called all users of class 10 and
25 above, to shut off their water. The highest priority user is a class 1

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27 **CONCLUSIONS OF LAW & ORDER**
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XIV

Mr Drury visited Mr Fletcher's site on July 8, 1994. He photographed the concrete diversion box and the South Fork of Harvey Creek, in the immediate vicinity. He recorded the flow of the creek above the diversion box as 0.28 cfs. Below the diversion, he estimated the flow, through leakage, at about 1 gpm or less. Photographic exhibits substantiate that the diversion box had captured essentially the entire flow of the creek.

XV

When Mr Drury returned on July 14, he found the same prevailing situation. He measured the flow upstream of Mr Fletcher's diversion at 0.29 cfs, and below, estimated it to be 1 gpm or less. His photographs on the second visit depict the unchanging stream flow conditions between the two visits.

XVI

On that same day, Mr Drury returned to his office and recommended an enforcement order and \$1000 civil penalty be issued to Mr Fletcher. Ecology issued a separate order and \$1000 civil penalty on July 19, 1994. The civil penalty was the maximum allowable under the Water Code for 10 days of violation (from July 5 -15, 1994), at \$100 per day. The order requires Mr Fletcher to cease and desist immediately from exceeding the permitted diversion of 0.04 cfs.

1 under permit no S3-28063P, and to install within 30 days of the order, a measuring device
2 approved by Ecology, to accurately measure the water being diverted under this permit
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4 **XVII**

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6 Mr Fletcher appealed the civil penalty to this Board on August 15, 1994 Mr Fletcher
7 met with Mr Drury and his supervisor on August 22, 1994 He purchased a flow meter that day,
8 but has not shown it to Ecology, nor has he installed it
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10 **XVIII**

11 Mr Fletcher is presently serving 4 residences from the diversion authorized by the
12 domestic permit, that by its terms is limited to 2 residences
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14 **XIX**

15 Mr Fletcher, in response to Board Member Kelley's question about his response to
16 enforcement of the Water Code, replied that he had previously refused to pay a \$2500 fine
17 assessed for allegedly working in the creek, insisting that he was innocent He consequently
18 spent 10 days in jail
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1 **XX**

2 After he received Ecology's order Mr. Fletcher found a leak in the pipe that flows from
3 the box to his residence He repaired that leak
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5 **XXI**

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7 Mr Fletcher cited the fact that he lives about a mile and a half from the concrete
8 diversion box, and the fact that he has broken both knee caps as reasons for his lack of diligence
9 in complying with Ecology's orders
10

11 **XXI**

12 Ecology has not yet determined whether Mr Fletcher has properly perfected permit no
13 S3-2806P, in order that he may qualify to obtain a certificate of water right
14

15 **XXII**

16
17 Any conclusion of law deemed to be a finding of fact is hereby adopted as such From
18 these findings of fact, the Board issues the following
19

20 **CONCLUSIONS OF LAW**

1 I

2 The Board has jurisdiction over this appeal under RCW 43 21A 064(3), RCW
3 43 27A 190(1), and RCW 90 03
4

5 II

6 Mr Fletcher did not deny committing the violation he was charged with He in fact was
7 quite candid that the facts testified to by Ecology were true We conclude that he clearly and
8 repeatedly has violated the terms of his permit He argued however, that the Board should
9 consider extenuating circumstances, in determining the amount of the penalty, such as his
10 personal health, and the distance he lives from the diversion point
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12 III

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14 The burden of proof, in determining the amount of a civil penalty, shifts from the issuing
15 agency to the penalized party WAC 371-08-183 states that the issuing agency shall have the
16 initial burden of proof in penalty cases We interpret that to mean that the issuing agency has the
17 initial burden of proving the violation occurred If that is proven, the burden shifts to the
18 penalized party to show the penalty is unreasonable To the extent this conclusion departs from
19 prior case law before this Board, those cases are reversed See Washington Chemical, Inc. v.
20 Ecology, PCHB Nos 90-87 & 91-12 (1993), Protan Laboratories v. Ecology, PCHB No 86-20
21 (1986)
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IV

The Board, in determining the reasonableness of a penalty, may consider the nature of the violation, the previous history of the appellant, and the actions of the appellant since the violation to correct the problem. We conclude that the appellant has clearly and repeatedly violated the Water Code, compelling Ecology to seek court relief for violations of this permit. Mr. Fletcher has shown no remorse. He apparently is unaware of the impact of his actions on the public waters of the state.

V

We note that there is an anomalous discrepancy between the civil penalty limits under the air and water pollution laws of this state, as compared with those contained in the Water Code. This is a matter that should be reviewed by the Legislature. The Board is bound by the statutory limits for civil penalties of the Water Code. Mr. Fletcher has been fined the maximum amount for a 10 day period of violation. We affirm the maximum penalties assessed in this case. Mr. Fletcher has a history of repeated violations of the conditions of the Water Code. He is still illegally serving 4, instead of the allowable 2 residences with the water from this domestic diversion. The concrete box is designed to take the whole flow of the South Fork of Harvey Creek, not merely the 0.04 cfs granted under the permit.

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VI

Additionally, due to the fact that civil penalties do not appear to be adequate to achieve their purpose. i.e., to ensure compliance with the Water Code, the Board concludes that Mr Fletcher shall have until June 1, 1995 to come into full compliance with the Water Code and permit no S3-2806P by

- 1) installing a flow meter that meets the approval of Ecology,
- 2) submitting monthly flow reports (semi-monthly reports during the irrigation season), detailing how much water is being taken under permit no S3-28063P;
- 3) installing a flow restriction device in the diversion box that meets Ecology approval, and
- 4) demonstrating to Ecology's satisfaction that the uses under the permit are limited to 2 residential units

VII

Any finding of fact deemed to be a conclusion of law is hereby adopted as such From the foregoing findings of fact and conclusions of law, the board enters the following.

ORDER

1. The Board affirms the \$1000 civil penalty assessed against Mr Fletcher
- 2 In addition, the Board orders Mr Fletcher to do accomplish the following, by June 1, 1995

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CONCLUSIONS OF LAW & ORDER
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- 1 a) install a flow meter that meets the approval of Ecology,
2
3 b) submit monthly flow reports (semi-monthly reports during the irrigation
4 season), detailing how much water is being taken under permit no S3-
5 28063P;
6 c) install a flow restriction valve in the diversion box that meets Ecology
7 approval, and
8 d) demonstrate to Ecology's satisfaction that the uses under the permit are
9 limited to 2 residential units


3 If Mr Fletcher fails to complete steps 2(a)-(d) by the deadline, Ecology shall
suspend his surface water permit

DONE this 3rd day of January, 1995

POLLUTION CONTROL HEARINGS BOARD


ROBERT V JENSEN, Chairman


RICHARD C KELLEY, Member


JAMES A TUPPER, JR, Member

P94-178F

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